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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

NO. 191

ROESER & PENDLETON, INC., *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

(October 13, 1941)

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

In accordance with Supreme Court Rule 33, this Petition for Rehearing is filed within twenty-five days from the date, October 13, 1941, of denial by this Court of Petition for Certiorari to review judgment of the United States Circuit Court of Appeals reported in 118 Fed. (2d) 469—See R. 138-142.

Petitioner, while conceding that, under Supreme Court Rule 38-5 (b), a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special

and important reasons therefor, feels that there are impelling reasons why this Court should grant a rehearing herein.

A careful search of the cases will probably show few instances in which there has been as much conflict in the holdings of the Court of Claims and the several Circuit Courts of Appeals as there has been in this case upon the question of whether a seller of a producing oil and gas lease, for part cash and a stipulated payment out of a reserved portion of the oil, is entitled to the statutory 27½% depletion on the cash payment received from the sale, treating the cash payment as a bonus or advance royalty.

FIRST, the Fifth Circuit, in the *Fleming Case*, 82 F. (2d) 324, on Mar. 7, 1936 held that the Seller was *not* entitled to the depletion allowance. Senior Judge Foster dissented.

NEXT, five members of the U. S. Board of Tax Appeals, on Nov. 13, 1936, in the *Roy H. Laird Case*, 35 B. T. A. 75 (dissenting) declined to follow the majority decision of the Fifth Circuit in the *Fleming Case*.

NEXT, the Ninth Circuit, on June 21, 1937, in the *Elbe Oil Company Case*, 91 Fed. (2d) 127, declined to follow the majority decision of the Fifth Circuit in the *Fleming Case*.

NEXT, the Supreme Court granted Certiorari in the *Elbe Oil Company Case* (303 U. S. 372, 374) to resolve the conflict between the decision of the Ninth Circuit Court in that case and the majority decision of the Fifth Circuit Court in the *Fleming Case*.

NEXT, the Supreme Court, in deciding the *Elbe Oil Company Case* (303 U. S. 372) found it unnecessary to decide whether the holding of the Ninth Circuit Court in that case was in conflict with the Fifth Circuit Court's holding in the *Fleming Case*, inasmuch as the Supreme Court found that the facts in the *Elbe Case* were different from the facts in the *Fleming Case*, since in the former there was an outright sale, with no reserved interest in the minerals, whereas, in the latter, the reverse was the case.

NEXT, the Court of Claims, on May 6, 1940, in the *Heep Oil Corporation Case*, 32 Fed. Supp. 762, declined to follow the majority decision of the Fifth Circuit in the *Fleming Case.*

FINALLY, the Fifth Circuit, in the instant case, reaffirmed and followed its previous decision in the *Fleming Case*, and the Supreme Court, on October 13, 1941, refused Certiorari to review its decision. This petition for rehearing is addressed to its action in so doing.

From the foregoing, it will be observed that Senior Judge Foster of the Fifth Circuit (dissenting) in the *Fleming Case*, 82 F. (2d) 324, five members of the Board of Tax Appeals (dissenting) in the *Roy H. Laird Case*, (35 B. T. A. 75), the Ninth Circuit in the *Elbe Oil Company Case*, 91 Fed. (2d) 127, the Court of Claims in the *Heep Oil Corporation Case*, 32 Fed. Supp. 762, have rendered opinions in said cases, which are in direct conflict with the decision of the Fifth Circuit Court in the *Fleming Case*, supra, and in Petitioner's case, now before this Court on rehearing.

It is true that Senior Judge Foster in cases following *Commissioner v. Fleming*, 82 Fed. (2d) 324, agreed with the majority, in line with the *Fleming Case*; however, the Ninth Circuit Court in the *Elbe Case*, and the Court of Claims in the *Heep Case*, have not receded from their difference with the Fifth Circuit on the question here involved.

GROUNDS FOR REHEARING

Ground One: Since *Hamilton Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251 (see Honnold's Supreme Court Law, Vol. 1, p. 269), it has been settled that the Supreme Court's refusal of certiorari is not equivalent to an affirmance of the decree; hence the Supreme Court's denial of certiorari in a Federal tax suit does not settle the issue, but leaves it open for future controversy and litigation between the Treasury Department and taxpayers. This situation is not only confusing to the Treasury Department and to the taxpayer alike, but renders difficult the orderly administration of the Federal Income Tax Law. Petitioner submits that it is to the public interest in the collection of income taxes to finance the operations of the Federal Government, for the courts to speedily clarify and finally adjudicate questions as to which there may be serious doubt, and especially those concerning which there has been so much difference of opinion as in the one involved in this case.

Ground Two: The Petition for Certiorari involves an important Federal question, which concerns the right of a lessee, in making a sale of an oil property for a stipulated amount of cash, and the retention of

"an economic interest of a stated portion of the oil and gas in place — in the nature of an overriding royalty, to claim the statutory 27½% depletion allowance on the cash received from the sale, treating such cash, as a return *pro tanto* of the seller's capital investment in such oil in anticipation of its extraction." *(Palmer v. Bender*, 287 U. S. 551.)

Petitioner respectfully submits that, with respect to the above Federal question, the decision of the United States Circuit Court of Appeals for the Fifth Circuit (R. 138-142) is in direct conflict with the hereinafter mentioned decision of the Circuit Court of Appeals in the *Heep Case*, and the decision of the Ninth Circuit in the *Elbe Oil Company Case;* and such being the case, in order to settle the conflict once and for all, and not to leave the question open for further controversy between the Treasury Department and taxpayers, this Court should grant this Petition for Rehearing, as well as the Petition for Certiorari, and decide the question.

Petitioner knows of no better way to demonstrate a conflict between two decisions, than by quoting from each of them. Therefore, with permission of this Court, the opinion of the Court of Claims in the *Heep Case*, and the opinion of the Ninth Circuit in the *Elbe Case*, will be quoted and compared with the opinion of the Fifth Circuit in the instant case, so that this Court may quickly observe the direct conflict that exists between the Court of Claims and the Ninth Circuit on the one hand, and the Fifth Circuit on the other, with respect to the important tax question here involved.

FIRST CASE IN CONFLICT:

The United States Court of Claims in *Heep Oil Corporation v. United States*, 32 Fed. Supp. 762, decided May 6, 1940, in its opinion said:

> "We are further of the opinion that if it is entitled to depletion, this depletion must be computed with respect to the *entire amount* paid and not merely on the deferred *payments* to be made out of the oil produced. (Italics ours.)
>
> "In Commissioner v. Fleming, 82 F. (2d) 324, the majority of the court in the Fifth Circuit held that depletion should be computed only on the deferred payments, on the theory that that part of the oil out of which the deferred payments were to be made had not been sold. *Circuit Judge Foster dissented.* The Ninth Circuit, on the other hand, in the case of Elbe Oil Land Development Company v. Commissioner, 91 F. (2d) 127, held that depletion should be computed both on the deferred payments and the cash payment as well. Judge Garrecht dissented, but not on this ground. The Supreme Court reversed the Circuit Court of Appeals (Helvering v. Elbe Oil Land Development Company, 303 U. S. 372, 58 S. Ct. 621, 82 L. Ed. 904), but on the ground that the transaction there was an absolute sale of the leasehold, with no reservations to the grantor of any economic interest in the oil situated thereon.
>
> "If by the instrument in the case before us, properly construed, the plaintiff had conveyed all of the land except a portion which it reserved to itself, it would follow that it was entitled to depletion only on the oil reserved, but, as we have said heretofore, we think the conveyance here

was of all the oil, except for the 1/32nd part of that produced from sands below the 3800-foot level. In such case, if plaintiff's net income is to be computed by the deduction of depletion from the amount received, rather than the cost of the property, *it must be computed with respect to the entire amount received. The cash payment must be treated as a bonus or advance royalty.* Burnet v. Harmel, 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199; Murphy Oil Co. v. Burnet, 287 U. S. 299, 53 S. Ct. 161, 77 L. Ed. 318." (Italics ours.)

The conflict between the holding of the Court of Claims in the *Heep Case*, supra, and the holding of the Fifth Circuit in the instant case clearly appears from the following statement contained in the Fifth Circuit Court's opinion in the instant case, 118 Fed. (2d) 462, 463:

"The taxpayer contends that it should have been allowed statutory depletion of 27½% on the $212,-581.77 of the cash payment received by it from the sale of its interest in the oil and gas leases. This contention is also without merit. The Board properly disallowed percentage depletion with respect to the cash payment received by the taxpayer. Commissioner v. Fleming, 5 Cir., 82 F. (2d) 324; Laird v. Commissioner, 5 Cir., 97 F. (2d) 730; Blankenship v. United States, 5 Cir., 95 F. (2d) 507; Cf. Anderson v. Helvering, 310 U. S. 404, 60 S. Ct. 952, 84 L. Ed. 1277."

Respondent, on page 15 of his brief filed in this Court, says that the holding of the Court of Claims in the *Heep Case*, as above set out, is "dictum." Further that whatever significance might otherwise attach to the holding in the *Heep Case*, is virtually eliminated

by the squarely contradictory holding by the same Court in *Berry Oil Company v. United States*, 25 Fed. Supp. 97; certiorari denied 307 U. S. 634. As pointed out on page 50 of Petitioner's brief, the *Berry Case* involved an outright sale, with no reservations of minerals, as was the case in the *Elbe Oil Company*, 303 U. S. 372. Therefore, the facts in the *Berry Oil Company Case* and the *Heep Case*, both by the Courts of Claims, involved wholly different facts, because in the *Heep Case*, the Court of Claims in its opinion said, "We think the conveyance here was of all of the oil except for the 1/32nd part of that produced from sands below the 3800-foot level," whereas, in the *Berry Case*, the Court of Claims held there was an outright sale and no reservation of minerals.

SECOND CASE IN CONFLICT:

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Elbe Oil Company v. Commissioner*, 91 Fed. (2d) 127, decided June 21, 1937, in its opinion said:

> "In Commissioner v. Fleming, supra, a similar question was presented. The cash payment was $1,000.00, and a second million was to be paid from the proceeds of the oil derived from the premises. It was held by a majority of the Court that the seller of the land was not entitled to a depletion deduction from the $1,000.00 in cash which he had received, but that he was entitled to a deduction from the payments derived from 'one-fourth of oil, gas and other minerals produced,' etc. Circuit Judge Foster dissented upon the ground that, under the decision of the Su-

preme Court in Palmer v. Bender, supra, there should also be a deduction for depletion on cash payment 'since the taxpayer retained an economic interest in the oil in place'." * * *

"If the case at bar cannot be distinguished from the decision of the Fifth Circuit Court of Appeals in Commissioner v. Fleming, supra, because of the fact that the two $400,000 payments involved here were to be optional with the purchaser, and this were obviously dependent upon the result of exploratory operations for oil, and because of the fact that the vendee had the right to surrender the premises at any time before the payment of the second $400,000, as the Commissioner contends it can be distinguished, *we must then decline to follow that decision. In the case at bar it is entirely clear that no matter what language we use in describing the nature of the transaction between the petition and the Honolulu Company, the petition had at all times an economic interest in the oil produced from the leased premises and was therefore entitled to a depletion allowance upon the cash paid as well as the oil produced.*" (Italics ours.)

As stated above, the Circuit Court of Appeals for the Fifth Circuit in Petitioner's case, on this same question, held directly contrary to the decision of the Ninth Circuit Court in the *Elbe Oil Company Case*, above set out, as shown by the following quotation from the Fifth Circuit's opinion in the instant case:

"The taxpayer contends that it should have been allowed statutory depletion of 27½% on the $212,581.77 of the cash payment received by it from the sale of its interest in the oil and gas

leases. This contention is also without merit. The Board properly disallowed percentage depletion with respect to the cash payment received by the taxpayer. Commissioner v. Fleming, 5 Cir., 82 F. (2d) 324; Laird v. Commissioner, 5 Cir., 97 F. (2d) 730; Blankenship v. United States, 5 Cir., 95 F. (2d) 507; Cf. Anderson v. Helvering, 310 U. S. 404, 60 S. Ct. 952, 84 L. Ed. 1277."

Ground Three: Inasmuch as the Supreme Court granted certiorari (303 U. S. 372, top p. 374) in the *Elbe Oil Company Case* to determine the asserted conflict between the decision in that case by the Ninth Circuit Court, and the decision of the Fifth Circuit Court in the case of *Commissioner v. Fleming*, 82 F. (2d) 324, *upon the question here involved*, and since this court held, in deciding the *Elbe Oil Company Case*, 303 U. S. 372, that the facts in said case disclosed that the seller retained no economic interest in the oil in place, but on the contrary, made an outright sale, with respect to which no depletion was allowable, *it therefore follows that the conflict between the holdings of the Ninth Circuit and the Fifth Circuit Courts was not resolved by this Court*, because the facts were not found to be the same. Petitioner therefore respectfully submits that, if the question here involved was of sufficient importance to justify the Supreme Court in granting certiorari in the *Elbe Oil Company Case* to determine an asserted conflict between the decision in that case and the decision of the Fifth Circuit Court in the *Fleming Case* (which conflict was not decided because the facts in both cases were not the same), it is therefore equally important that this court grant certiorari in the instant case, so that the conflict be-

tween the holding of the Ninth Circuit in the *Elbe Case*, and the Fifth Circuit in this case, and the holding of the Court of Claims in the *Heep Case*, and the Fifth Circuit Court's holding in this case, may be resolved. It is submitted that, for this court to leave the matter further in suspense, is demoralizing to the effective administration of the income tax laws, alike to the Commissioner, as well as to taxpayers.

Ground Four: When the question here involved was first before the Fifth Circuit in the *Fleming Case*, 82 Fed. (2d) 328, Senior Judge Foster dissented from the majority view, saying:

> "I agree with the conclusion of the majority of the court as to the allowance of a deduction for depletion on the income received by the taxpayer out of the proceeds of oil produced from the lease. *However, I think we should go further and allow a deduction for depletion on the cash payment, not dependent on the production of oil, since the taxpayer retained an economic interest in the oil in place.* Palmer v. Bender, 287 U. S. 551, 53 S. Ct. 225, 77 L. Ed. 489. I therefore respectfully dissent." (Italics ours.)

Following the majority decision of the Fifth Circuit in the *Fleming Case*, supra, five members (Leech, Smith, Morris, Van Forsan and Tyson) of the U. S. Board of Tax Appeals, in the *Roy H. Laird Case*, 35 B. T. A. 75, at pages 78-79 (dissenting), declined to follow same, saying:

> "I think the rule in such cases is that when the taxpayer retains an economic interest in the oil in place, the bonus or cash consideration, from whatever the payor's source, as well as the de-

ferred payments from the oil, are gross income to the owner from that retained economic interest, and are, therefore, subject to the depletion allowance. Palmer v. Bender, supra; Helvering v. Commissioner, supra; Burnet v. Harmel, 287 U. S. 103; Welch v. Obispo Oil Co., 61 Fed. (2d) 1045; Helvering v. Falk, 291 U. S. 183; Signal Gasoline Corporation v. Commissioner, 66 Fed. (2d) 886.

"Here the retention of any 'economic interest in the oil in place' may be debatable. However, I agree with the Fleming case and the majority opinion of the Board here that the taxpayer did retain such an interest. Commissioner v. Elliott Petroleum Corporation, 82 Fed. (2d) 193; Chester Addison Jones, 31 B. T. A. 55; aff'd., 82 Fed. (2d) 329; Commissioner v. Williams, 82 Fed (2d) 328; Alexander v. Continental Petroleum Co., 63 Fed. (2d) 927. *But, since he did retain such an economic interest, I think that the bonus, as well as the deferred payments, were income from the economic interest, and both are, therefore, depletable. Palmer v. Bender, supra; Herring v. Commissioner, supra.*" (Italics ours.)

It is indeed difficult to find a comparable situation where there has been such diversity of opinion as on the question here involved; and unfortunately, both for the Collector and taxpayer, not yet finally decided by this Court.

Ground Five: On October 27, 1941, this Court denied Petition for Writ of Certiorari in *MeLean v. Commissioner of Internal Revenue*, 120 Fed. (2d) 942, decided by the Fifth Circuit on June 20, 1941. In the opinion of the Fifth Circuit Court in that case, the

statement is made that the *Elbe Case* was decided on the basis that there was no reservation of royalty and no retention of ownership of an interest in the minerals in place; there being only a personal covenant to pay the taxpayer, not out of minerals in place, but out of the net proceeds of a processing or manufacturing operation. This language of the Fifth Circuit reinforces and reemphasizes the contention heretofore made by Petitioner that this Court, in deciding the *Elbe Case*, 91 Fed. (2d) 127, found it unnecessary to resolve the conflict between the Ninth Circuit's decision in the *Elbe Case* and the Fifth Circuit's decision in the *Fleming Case*, since the facts in said cases were entirely different.

Petitioner is informed that Petition for Rehearing will soon be filed in the application for certiorari in the *McLean Case*. Inasmuch as the Petitioner in that case is contending that the transaction there involved is not governed by *Palmer v. Bender*, 287 U. S. 551, and Petitioner in the instant case is asserting that its right to the 27½% statutory depletion is based upon and governed by the principles announced in *Palmer v. Bender*, this Court has a fine opportunity of granting petitions for rehearing in both the instant case and the *McLean case*, to review its holding in *Palmer v. Bender*, as explained in *Anderson v. Helvering*, 310 U. S. 404, and thus make crystal clear to the Treasury Department, as well as to taxpayers the meaning and effect, and the extent to which the "economic interest" doctrine in *Palmer v. Bender*, should be applied. Headway along these lines was made by the court in *Anderson v. Helvering*, supra, but it is respectfully submitted, a further review and consid-

eration by this court of the application of the economic interest doctrine would be most helpful to everyone affected by the income tax laws of the United States.

CONCLUSION

As hereinbefore pointed out, since this court felt that the depletion question here involved was sufficiently important to justify the granting of a review on certiorari in the *Elbe Case*, 91 F. (2d) 127, in order to resolve a conflict in decisions between the Ninth Circuit in the *Elbe Case*, and the Fifth Circuit in the *Fleming Case*, and since this court found it unnecessary in deciding the *Elbe Case*, 303 U. S. 372, to resolve such conflict, inasmuch as the facts in the *Elbe Case* were found to be different from those in the *Fleming Case*, Petitioner respectfully submits that it is now just as important, in the administration of the Federal income tax law for this court to resolve the conflict on the same question which now exists between the decisions of the Court of Claims in the *Heep Case*, the Ninth Circuit in the *Elbe Case*, and the Fifth Circuit in this case.

Respectfully submitted,

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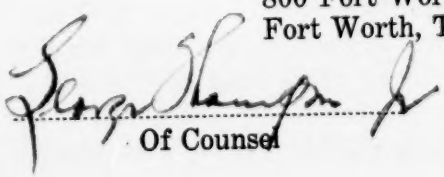

Of Counsel

CERTIFICATE

I, George Thompson, Jr., do hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay.